GRANTED

No. 05-1541

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IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF

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This case presents a question of whether Congress intended that 26 U.S.C. § 7426 be the sole and exclusive remedy available to a third party whose property has been seized under a levy to satisfy taxes due by other taxpayers or whether Congress intended that the refund statute, 28 U.S.C. § 1346, continue to be available to a third party regardless of whether the third party failed to file a timely claim under 26 U.S.C. § 7426. Congressional intent evidenced by the language of 26 U.S.C. § 7426 indicates that this statute did not preempt 28 U.S.C. § 1346 and did not become an exclusive remedy. Congressional intent as evidenced by reference to legislative history also indicates that Congress did not intend for 26 U.S.C. § 7426 to be the sole and exclusive remedy for a wrongful levy. Further, reasonable inferences drawn from the structure of 26 U.S.C. § 7426 do not support the conclusion that it was intended by Congress to be a sole and exclusive remedy for a wrongful levy. The Fifth Circuit erroneously concluded that Congress intended that 26 U.S.C § 7426 be the sole and exclusive remedy from the legislative history due to the fact that 26 U.S.C. § 7426 had a shorter statute of limitations than 28 U.S.C. § 1346. This Court should reverse the Fifth Circuit's judgment and hold that 28 U.S.C. § 1346 is available to a third party whose property has been seized through a wrongful levy even if the third party had an opportunity to utilize 26 U.S.C. § 7426.

STATEMENT OF THE CASE

In 1991, Elmer W. Cullers, Jr. and Dorothy Cullers created the EC Term of Years Trust to reduce the impact of federal estate taxes on their estates. In 1993, the Internal Revenue Service assessed additional federal income taxes, penalties and interest against Elmer W. Cullers, Jr. and Dorothy Cullers for tax years 1981 through 1984. In 1999, claiming that the Cullers had transferred property to the EC Term of Years Trust to avoid paying federal income taxes, the Internal Revenue Service filed transferee tax liens against the EC Term of Years Trust for the tax liability owed by the Cullers.

In 1999, the Internal Revenue Service threatened to take legal action against the EC Term of Years Trust to seize and sell its property to satisfy the tax obligations of the Cullers. To avoid the sale of its property, in 1999 the EC Term of Years Trust deposited the total amount of taxes, penalties and interest due by Elmer W. Cullers, Jr. and Dorothy Cullers in a bank account and notified the Internal Revenue Service so that it could levy on the account. On September 10, 1999, the IRS levied on the bank account established by EC Term of Years Trust, which contained $3,389,426.37, and seized all funds therein to satisfy the tax liabilities owed by the Cullers. (Joint Appendix, paragraph 8 of Exhibit B attached to Exhibit D)

In September 2000, EC Term of Years Trust and other entities filed a complaint for a wrongful levy under 26 U.S.C. § 7426; however, the complaint was filed more than nine months after the levy. On December 28, 2000, the District Court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it had been filed more than nine months after the levy and was time barred under 26 U.S.C. § 7426.

On September 6, 2001, EC Term of Years Trust filed an administrative claim for a refund for the amount seized by the Internal Revenue Service under the levy. After the claim for a refund was denied, on September 6, 2001, EC Term of Years Trust filed a complaint for a refund of the $3,389,426.37 in the United States District Court for the Western District of Texas - El Paso Division under 28 U.S.C. § 1346. On November 22, 2004, the District Court held that Petitioner's sole remedy was under 26 U.S.C. § 7426 and dismissed Petitioner's Complaint for lack of subject matter jurisdiction.

Petitioner appealed the case to the Fifth Circuit in reliance on this Court's holding in *United States v. Williams*, 514 U.S. 527 (1995) and the Ninth Circuit Court of Appeal's

holding in *WWSM Investors v. United States*, 64 F.3d 456 (9th Cir. 1995). The Fifth Circuit held that the wrongful levy procedure under 26 U.S.C. § 7426 is the exclusive remedy for a wrongful levy and affirmed the dismissal of EC Term of Years Trust's Complaint for lack of subject matter jurisdiction.

ARGUMENT

A. Congressional intent, if not expressly made clear, can be determined only through reasonable inferences. This case should be decided by determining congressional intent without making unjustified inferences. Preemptive intent cannot be lightly inferred. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). Preemptive design must be clear and manifest. *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055 (9th Cir. 1988, cert. den.)

Petitioner has pointed out in its brief that Congress did not expressly make § 7426(a)(1) the exclusive remedy in a wrongful levy context. Petitioner has also pointed out that Congress has expressly made other provisions of the Internal Revenue Code exclusive and could have done so with § 7426 had that been its intent.

Nevertheless, the Government argues that:

> Congress's creation of a specific remedy tailored to a particular set of circumstances will foreclose resort to a more general remedy. That result is clearly appropriate when, as here, the "balance, completeness and structural integrity" of the specific remedy suggest that it was intended by Congress to be the exclusive avenue of relief. Creation of a short statute of limitation for a specific remedy is a powerful indicator that

> Congress intended that remedy to be exclusive of other potential available remedies with longer limitations periods.

(Respondent's Brief, p. 7)

The Government also argues that "Most significantly, allowing third parties to pursue a tax-refund action in addition to a wrongful-levy action would effectively 'render[] nugatory' the shorter limitations period that Congress placed on wrongful levy actions . . ." (Respondent's Brief, pp. 7-8). Thus, because exclusivity was never expressly declared, the Government finds itself having to ask this Court to infer that Congress intended for § 7426 to be an exclusive remedy.

The phrase "balance, completeness and structural integrity" is a quote from *Brown v. General Services Admin.*, 425 U.S. 820, 832 (1976). In *Brown*, this Court held that the remedies made available to federal employees under the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, were exclusive. Two principal factors appeared to support the holding in *Brown*. First, the Court believed that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. *Brown*, 425 U.S. at 828. Second, the Court observed that the Civil Rights Act was a "careful blend of administrative and judicial enforcement powers." *Brown*, 425 U.S. at 833. This Court concluded that "the balance, completeness and structural integrity" was inconsistent with Congressional intent to merely supplement, rather than preempt, other forms of relief. *Brown*, 425 U.S. at 832.

However, even a cursory reading of § 7426 indicates that its structure cannot be favorably compared to the comprehensive structure of the Civil Rights Act. The Civil Rights Act was an all-encompassing piece of legislation that

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was created to afford a new remedy and included a variety of administrative and judicial mechanisms to protect employees who suffered from discriminatory action. On the other hand, prior to the enactment of § 7426, third parties had a remedy but it involved having to sue government officials. Section 7426 simply allowed direct suits against the Government. As for "balance, completeness and structural integrity," § 7426 does not even require a claimant to exhaust administrative remedies before commencing litigation. The Civil Rights Act and § 7426 are not comparable in the sense used in *Brown*. Finally, in *Gordon v. United States*, 649 F.2d 837 (1981), the Court of Claims weighed in on the issue of the exclusivity of § 7426. That Court stated, "While I.R.C. § 7426 does provide a range of remedies, it lacks the "careful blend of administrative and judicial enforcement powers" the Supreme Court underscored in *Brown v. General Services Administration, supra*. . . . Continued jurisdiction in this court does not render I.R.C. §7426 meaningless. Thus, we cannot infer exclusivity." *Gordon*, 649 F.2d at 842.

Further, the legislative history of § 7426 also supports the reasonable inference that it was intended to be supplemental rather than exclusive. First, the 1966 committee reports on § 7426 do not contain any reference to exclusivity. Prior to the enactment of § 7426, persons who suffered from a wrongful levy had a remedy in the form of a suit against the tax collector. § 7426 gave such persons the right to sue the Government directly and prohibited suits against the tax collector.

Section 7426 was enacted to provide a direct source of redress against the Government instead of having to proceed with the fiction of filing suit against an individual government official. To conclude that creating a direct remedy against the Government under § 7426 rendered § 1346 meaningless involves making an inference that is not supported by the known legislative history.

B. Legislative history does not support exclusivity. Further, the inferential argument for exclusivity being made by the Government based on legislative history is not supported by the holding of this Court in *United States v. Williams*, 514 U.S. 527 (1995). The Government argued that the legislative history, at the time § 7426 was enacted, indicated no other remedies were available to non-taxpayers. However, the holding in *Williams* established that § 1346, a statute much older than § 7426, was also available to non-taxpayers.

C. A shorter statute of limitations does not justify an inference of exclusivity. The Government is also arguing for exclusivity by pointing out that the shorter statute of limitations in § 7426 would be rendered meaningless if a third person has the option of utilizing § 1346. This Court was unmoved by that argument. Furthermore, the argument being made by the Government presumes that § 1346 and § 7426 cannot be harmonized and coexist. This is plainly evident by the fact that § 7426 can be used as a pre-deprivation remedy while § 1346 is a post-deprivation remedy. In order for one statute to preempt another, "it is not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower*, 426 U.S. at 155.

D. The holding in *United States v. A.S. Krieder* does not support exclusivity. The Government also relies on *United States v. A.S. Krieder*, 313 U.S. 443 (1941) for the proposition that a shorter statute of limitations tied to a specific remedy will always preempt a longer statute of limitations tied to general relief. *Krieder* was decided on a statute that was phrased as follows: "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made." *Krieder*, 313 U.S. at 447. The Court held that this language only put an outside limit on the time by which suits must be filed and that, by phrasing it in the negative,

Congress could provide for a shorter statute of limitations for specific types of cases. However § 6511, which provides for the limitations periods in a § 1346 action, is not phrased in the negative. The reasoning in *Krieder* simply does not apply to the issue of whether § 7426 preempts § 1346.

E. The enactment of § 7426(a)(4) as an exclusive remedy supports a reasonable inference that § 7426(a)(1) is not exclusive. In footnote 10 of its Brief, the Government noted that, in the wake of *Williams*, Congress enacted § 7426(a)(4) which gave persons like Williams a remedy apart from a tax refund suit. § 7426(a)(4) provides for exclusivity through the following language: "[no] other action may be brought by such person for such a determination." The footnote goes on to state that "To the extent that this language reflects Congress's intent to make the remedy under § 7426(a)(4) an exclusive one, that does not suggest that the pre-existing wrongful levy remedy in § 7426(a)(1) is not exclusive in situations to which it applies." Notwithstanding the Government's assertion, the most reasonable inference that can be drawn from the enactment of § 7426(a)(4) with its exclusivity provision is that § 7426(a)(1) is not exclusive. As noted earlier in this Reply Brief, Congress knows how to write exclusivity into a statute when that is its intention. Section 7426(a)(4) is a very good example that is relevant to this case.

F. Exclusivity cannot be inferred when two statutes can co-exist. This Court has stated that "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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